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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

QUALITY KING DISTRIBUTORS, INC.,

Petitioner,

v.

L'ANZA RESEARCH INTERNATIONAL, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE JAN-BELL MARKETING, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Jan-Bell Marketing, Inc. ("Jan-Bell") files this amicus curiae brief with the written consent of petitioner and respondent. Consent has been filed with the Clerk of the Court.

Jan-Bell provides fine jewelry, watches and certain other consumer products to the value conscious consumer. Jan-Bell principally markets its products through exclusively leased departments in Sam's Clubs across the United States. Sam's Club, a division of Wal-Mart, Inc., is a warehouse membership club. Warehouse membership clubs offer a variety of product categories to targeted customers. By limiting the assortment in each product category and operating on a "no frills" basis, warehouse membership clubs generally provide name-brand products at prices significantly below conventional retailers and department, discount and catalog stores.

Jan-Bell, like other retailers both large and small, frequently purchases genuine brand name goods from independent distributors, wholesalers and middlemen located in the United States. Certain of these goods sold by Jan-Bell are subject to the United States Copyright Act. Since 1995, Jan-Bell has been a party to four lawsuits in which copyright owners alleged that Jan-Bell's sales of genuine goods violate section 106(3) and/or 602(a) of the Copyright Act.[1]

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[1] *Enesco Corp. and Precious Moments, Inc. v. Jan-Bell Marketing, Inc.*, Civil Action No. 96 C 3842 (N.D. Ill.); *Jan-Bell Marketing, Inc. v. Disenos Artisticos E Industriales, Inc.*, Civil Action No. 95-7124-Civ. (S.D. Fla.); *Department 56, Inc. v. Jan-Bell Marketing, Inc.*, Civil Action No. 95 CV 9327 (S.D.N.Y.); *Precious Moments, Inc. v. Jan-Bell Marketing, Inc.*, Civil Action No. 94 C 5553 (N.D. Ill.)

Pursuant to Rule 37.6, counsel for Jan-Bell Marketing, Inc. authored this amicus brief in whole, and no other entity made monetary contributions to the preparation or submission of this brief.

The Ninth Circuit's decision fails to address the impact of its interpretation of the Copyright Act on United States retailers such as Jan-Bell which purchase genuine goods in the United States. If the decision stands, retailers may be stripped of their vested property interests in their inventory of certain genuine goods purchased through established channels of commerce in the United States because, unbeknownst to them, the goods had been imported by another participant in the distribution chain several transactions before the retailers acquired the goods. Retailers will be effectively foreclosed from purchasing genuine brand-name goods from any independent distributor, wholesaler, or middleman in the future out of fear that such a purchase would put the retailer in jeopardy of falling victim to the potent arsenal of remedies available under the Act. This contraction in the supply of genuine goods inevitably will lead to increased prices and may preclude Jan-Bell and other lower-price retailers from making available genuine goods to United States consumers at value prices.

SUMMARY OF ARGUMENT

The sale of copyrighted goods implicates two distinct property interests, the copyright owner's right to control the initial disposition of the goods granted by the Copyright Act and the tangible goods themselves, which are not and never have been subject to the Act. The Copyright Act strikes a careful balance between those two property interests. The Ninth Circuit's opinion upsets that balance.

The sale of a copyrighted good splits the two interests in the good. Once the copyright owner receives a reward

for the creative work embodied in a tangible good, the copyright owner's right to control the further disposition of that good gives way to the personal property rights of the purchaser of that good. The Copyright Act does not empower a copyright owner, having already received a reward for his creative work, to reclaim an interest in the good. This is the essence of the "first sale doctrine" in 17 U.S.C. § 109(a) and it applies regardless of whether the "first sale" occurred in the United States or abroad.

The first sale doctrine plays an indispensable role in commerce. It allows merchants to buy and sell goods without fear that the goods are subject to some hidden restraint on their alienation. The importance of this doctrine, however, is a direct function of its certainty. The erosion of the certainty provided by the first sale doctrine will force competitors out of the marketplace and artificially extend the limited monopoly of copyright owners beyond the purpose and language of the Copyright Act.

ARGUMENT

I. THE FIRST SALE DOCTRINE PROTECTS SUBSEQUENT PURCHASERS OF PERSONAL PROPERTY CONTAINING COPYRIGHTED ELEMENTS ONCE THE COPYRIGHT OWNER ALREADY HAS BEEN REWARDED FOR THE COPYRIGHT OWNER'S CREATIVE WORK.

A good that embodies some attribute subject to the Copyright Act is comprised of two categories of property interests: (1) the "bundle" of copyrights owned by the copyright holder and (2) the personal property rights of the owner of the good. *See* 17 U.S.C. § 202 ("Ownership of a copyright, or of any of the exclusive rights under a

copyright, is distinct from ownership of any material object in which the work is embodied.")

This case involves the relationship between these two distinct interests. Initially, both interests typically are owned by the same person, namely the copyright owner or, perhaps, the copyright owner's licensee or assignee.[2] The sale of the copyrighted good, however, results in a "splitting" or separation of these property interests: the copyright owner retains the copyright interest and the purchaser receives the personal property interest. This is because the sale of a copyrighted good transfers the personal property interest in the good to the purchaser but does not transfer the copyright interest. 17 U.S.C. § 202.

The particular copyright interest in question here is the copyright owner's "exclusive right[ ] . . . to distribute copies or phonorecords of the copyrighted work to the public . . . ." 17 U.S.C. § 106(3). The distribution right, known as the "right to vend" under prior copyright statutes, includes the right to block unauthorized importation of copyrighted goods into the United States. 17 U.S.C. § 602(a).

The distribution right differs somewhat from the other rights granted in section 106 in that the other rights involve unauthorized "copying" in the broad sense. 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.12 [A] at p. 8-142; *see Bobbs-Merrill Co. v.*

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[2] If the original copyright holder assigns or licenses any or all of the "bundle" of copyrights to another party, that other party becomes the "copyright owner" for purposes of the rights assigned or licensed. 17 U.S.C. § 101.

Straus, 210 U.S. 339, 347 (1908) ("[I]t is evident that to secure the author the right to multiply copies of his work may be said to have been the main purpose of the copyright statutes."). The distribution right supplements the prohibition against copying to allow the copyright owner to prevent the dissemination of even authorized copies of a work to the public without the copyright owner's consent. *See generally Bobbs-Merrill, supra*, 210 U.S. at 351; *Blazon, Inc. v. DeLuxe Game Corp.*, 268 F. Supp. 416, 434 (S.D.N.Y. 1965); *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*, 233 F. Supp. 881, 883 (E.D. Pa. 1964).

Read in a vacuum, this "exclusive right to distribute" would seemingly allow a copyright owner to restrain the disposition of the personal property interest by dictating the terms of all subsequent transfers of the good. But this right has never been given such a sweeping construction. As this Court has long recognized, the copyright statutes do not permit the copyright owner to restrain "the subsequent alienation of the subject-matter of copyright after the owner [has] parted with the title to one who [has] acquired full dominion over it and [has] given a satisfactory price for it." *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908) (interpreting the "right to vend" under the 1901 Act).

Congress codified this limitation on the copyright owner's ability to control the disposition of a good in section 109(a) of the Copyright Act. 17 U.S.C. § 109(a). Section 109(a), commonly known as the "first sale doctrine," provides that the "owner of a particular copy . . . lawfully made under [the Act]" is entitled to dispose of that copy "without the authority of the copyright owner" notwithstanding the distribution right in section 106(3).

Id.[3] "Section 109(a) is an extension of the principle that ownership of the material object is distinct from ownership of the copyright in the material." *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (CA3 1984). *See also United States v. Wise*, 550 F.2d 1180, 1187 n. 9 (CA9 1977) (right to vend the transferred copy rests with vendee because copyright is distinct from property which is copyrighted).

A. The Purpose Of The Copyright Act Is Fulfilled Once The Copyright Owner Is Compensated For His Or Her Creative Work.

The well-recognized goal of the Copyright Act is "to stimulate artistic creativity for the general public good." *Sony Corporation of Amer. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). This goal is achieved by granting the author a "limited monopoly" which ensures that the author of a copyrighted work "secure[s] a fair return for [the] author's creative labor." *Id.* The Copyright Act is not designed to ensure that the copyright owner receives commercial success. *See id.* at 429. ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit.").

As applied to the distribution right, the goal of the Copyright Act is satisfied by allowing the copyright owner the right to control the "first sale" of a good there-

[3] It is irrelevant under section 109(a) whether the disposition of the good was made by the copyright owner or its licensee so long as the licensee is "the owner of [the] particular copy" which is sold. 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.12[B][3][C] at pp. 8-157 to 158 (1996).

by ensuring that the copyright owner receives a "fair return" for the *creative work* embodied in the good:

> [The rationale for the right to vend] becomes inapplicable in the situation where the copyright owner first consents to the sale or other disposition of copies of his work. In such circumstances the copyright owner wishes still to prevent unauthorized copying, but it is no longer for the purpose of preventing distribution of the copies which he has released into the public channels [because he has already] consented to such disposition of his work. Therefore the right to prevent unauthorized vending at that point (although still no doubt desired by the copyright owner) is no longer a necessary supplement for the purpose above described. In such circumstances, continued control over the vending of copies is not so much a supplement to the intangible copyright, but is rather primarily a device for controlling the disposition of the tangible personal property which embodies the copyrighted work. Therefore, at this point the policy favoring a copyright monopoly for authors gives way to the policy opposing restraints of trade and to restraints on alienation.

C.M. Paula Co. v. Logan, 355 F. Supp. 189, 191 (N.D. Tex. 1973).

This crucial distinction between the copyright owner's right to control the initial disposition of the good, on the one hand, and the purchaser's right to control the subsequent alienation of the personal property, on the other, applies with equal force to the statutory kin of the distribution right, the right to block importation in section 602(a):

> Nothing in the wording of section 109(a), its history or philosophy, suggests that the owner of copies

> who sells them abroad does not receive a "reward for his work." Nor does the language of section 602(a) intimate that a copyright owner who elects to sell copies abroad should receive a "more adequate reward" than those who sell domestically. That result would occur if the holder were to receive not only the purchase price, but a right to limit importation as well.

Sebastian International, Inc. v. Consumer Contacts (PTY), Ltd., 847 F.2d 1093, 1099 (CA3 1988).

Once the copyright owner receives a "reward for his work," the purpose of the Copyright Act is satisfied. The copyright owner's right to control the disposition of the good is extinguished and the good becomes nothing more than an article of personal property which is freely transferable in the stream of commerce.[4] 17 U.S.C. § 109(a). The copyright owner cannot again reclaim control over the disposition of the personal property as against subsequent purchasers of the good and extract some commercial benefit wholly separate from the reward for the creative work which the copyright owner already received.

B. The Elimination of the First Sale Doctrine In The Importation Context Would Divest Subsequent Purchasers of Their Personal Property Interest In Copyrighted Goods Purchased In Good Faith.

Having purchased title to a copyrighted good, a purchaser is "endowed with the ordinary incidents of own-

[4] The copyright owner, of course, retains his other copyright interests, such as the exclusive right of reproduction, which ensure that the copyright owner receives a fair return for other uses of the *creative work*.

ership, including the right of alienation." *United States v. Wise*, 550 F.2d 1180, 1187 n. 9 (CA9 1977). *See also Harrison v. Maynard, Merrill & Co.*, 61 F. 689, 691 (CA2 1894) (purchaser of particular copy gains "ordinary incidents of ownership in personal property, among which is the right of alienation"). The Ninth Circuit's decision strips subsequent purchasers of imported goods of their personal property interest in copyrighted goods as well as the purchaser's right of alienation. *See* 17 U.S.C. § 503(a) (authorizing a court to impound "all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights").

The Court should not infer such a fundamental restriction on a purchaser's property rights absent a clear and unambiguous direction from Congress. *See Public Utility Dist. No. 1 v. City of Seattle*, 382 F.2d 666, 670 (CA9 1967) ("Unless the legislative intent is clear, courts should be slow to adopt a construction the effect of which is a destruction of property rights . . . ."). Here, the Ninth Circuit relied on two snippets of legislative history. *L'anza Research International, Inc. v. Quality King Distributors, Inc.*, 98 F.3d 1109, 1116 (CA9 1996). Worse yet, these snippets were not the remarks of legislators, but of a "publisher" and a "music industry representative" who plainly represented their own interests—not those of Congress. *Id.* This is hardly the type of clear and unambiguous direction sufficient to divest purchasers across the United States of title to billions of dollars of genuine goods. *See Kelly v. Robinson*, 479 U.S. 36, 51 n. 13 (1986) (declining to accord "any significance" to statements made by individuals who were not members of Congress, or to statements not included in official Senate and House Reports).

II. THE ELIMINATION OF THE FIRST SALE DOCTRINE WITH RESPECT TO IMPORTED GOODS WOULD ARTIFICIALLY EXTEND THE LIMITED MONOPOLY OF THE COPYRIGHT OWNER BY CHILLING LEGITIMATE COMPETITION.

The first sale doctrine ensures the free-flow of goods in commerce without any hidden restraints on alienation. *See Bobbs-Merrill Co.*, 210 U.S. at 350; *Sebastian*, 847 F.2d at 1096. Read in conjunction with its state-law counterpart, the "good faith purchaser for value" rule, these statutes allow purchasers "safely to engage in the purchase and sale of goods without conducting a costly investigation of the conduct and rights of all previous possessors in the chain of distribution." *Johnson & Johnson Prod. v. Dal Int'l Trading Co.*, 798 F.2d 100, 104 (CA3 1986). *See also Disenos Artisticos E Industriales, S.A. v. Costco Wholesale Corp.*, 97 F.3d 377, 380 (CA9 1996) (noting the "impracticability of the burden" which would be imposed on a purchaser by requiring the purchaser to determine whether the copyright owner authorized the means of distribution). This fosters competition. *See generally City of Lafayette, LA. v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978) (noting that "Congress [has] sought to establish a regime of competition as the fundamental principle governing commerce in this country") (interpreting the Sherman Act).

A. Limiting The First Sale Doctrine To Non-Imported Goods Means That No Subsequent Purchaser of Goods Can Be Certain Of The Doctrine's Application.

From the perspective of retailers and other subsequent purchasers of goods, the Ninth Circuit's judicially-

created exception to the first sale doctrine for imported goods eviscerates the doctrine as it applies to *all* copyrighted goods. A subsequent purchaser of genuine goods in the United States is unable to discern whether the goods were distributed in the United States (and, therefore, free from restriction under the Copyright Act) or whether the distribution path of those goods took them outside the United States (and, thus, according to the Ninth Circuit, still subject to control by the copyright owner).

A subsequent purchaser cannot determine the distribution history of goods by inspecting the goods. Copyright owners do not visibly distinguish goods first sold in the United States from those first sold outside the United States. To the contrary, copyright owners often "mark" goods destined for foreign markets with secret codes in an effort to trap unknowing subsequent purchasers when they acquire goods imported by others. The goods themselves are identical from all outward appearances.

And, to suggest, as some copyright owners have, that a subsequent purchaser need only contact the copyright owner for distribution information ignores the business realities of the market place. *See, e.g., Disenos Artisticos E Indus. v. Costco Wholesale*, 97 F.3d 377, 380 (CA9 1996) (noting copyright owner's argument that subsequent purchasers should obtain certification from copyright owner that importation of goods purchased was authorized). The reason that copyright owners endeavor to reclaim the distribution right in the first place is to prevent subsequent purchasers from reselling genuine goods (typically at lower prices). A copyright owner will not voluntarily provide information to a retailer or other

subsequent purchaser which will foster the very competition which the copyright owner is trying to stifle.[5]

As another panel of the Ninth Circuit explained in a recent case, if the first sale doctrine is limited only to non-imported goods,

> every little gift shop owner in America would be subject to copyright penalties for genuine goods purchased in good faith from American distributors, where unbeknownst to the gift shop proprietor, the copyright owner had attempted to arrange some different means of distribution several transactions back.

Disenos Artisticos E Industriales, S.A., supra, 97 F.3d at 380. The Ninth Circuit's "exception," in short, swallows the "rule" and renders it meaningless as an agent of commercial certainty.

B. Section 602(a) Is Not Rendered Meaningless By Application Of The First Sale Doctrine To Imported Goods.

Section 602(a), in contrast, would not be rendered meaningless by applying the first sale doctrine as the

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[5] Any inquiry concerning the distribution chain will require verification from the copyright owner. A subsequent purchaser cannot verify the distribution chain by making inquiries of the immediate seller of the goods. Goods typically pass through many different hands in the stream of commerce from the point of manufacture to the point of sale to consumers at the retail level. The immediate seller of a good to a retailer cannot verify the conduct of the participants in the distribution chain which are two, three, four or more steps removed from the immediate transaction. Moreover, even assuming that a remote purchaser could trace a particular good through the distribution chain, the last link in the chain always would be the initial sale of the good by the copyright owner.

Ninth Circuit concluded erroneously. *See L'anza, supra,* 98 F.3d at 1114. Section 602(a), by its very terms, allows the copyright owner to establish a violation of the distribution right in the importation context by merely showing that a purchaser engaged in the act of "[i]mportation"—that is, the purchase of goods from a foreign source. *See* 17 U.S.C. § 602(a)(2) (excluding "importation, for the private use of the importer and not for distribution . . ."). A sale is not required. In contrast, infringement of the distribution right in section 106(3) typically requires that the purchaser actually disseminate copies to the public. *National Car Rental Sys., Inc. v. Computer Assoc. Int'l, Inc.*, 991 F.2d 426, 434 (CA8 1993), *cert. denied*, 114 S. Ct. 176 (1993); *Foreign & Domestic Music Corp. v. Licht*, 196 F.2d 627, 629 (CA2 1952) (holding that only the seller and not the buyer, is liable for the infringement of the right to vend under the 1909 Act). Section 602(a), therefore, allows a copyright owner under the appropriate circumstances to stop the dissemination of imported goods before the goods are put into the stream of commerce.

C. The Ninth Circuit's Decision Would Improperly Cause The Judicial Extension Of The Copyright Act's Limited Monopoly.

The uncertainty engendered by the Ninth Circuit's limitation on the first sale doctrine will upset the careful balance between the copyright owner's "interest [ ] in the control and exploitation" of his or her work, and "society's competing interest in the free flow of ideas, information and commerce." *Sony Corporation of Amer. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *cf. Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230

(1964) ("The patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition.") Purchasers of copyrighted goods will be discouraged from buying genuine goods from U.S.-domiciled wholesalers and middlemen out of fear that an inadvertent purchase of imported goods would expose the purchaser to the "potent arsenal of remedies" set forth in the Copyright Act. *Sony Corp. of Amer., supra*, 464 U.S. at 433. This will chill legitimate competition in the sale of goods, effectively expanding the "limited monopoly" of copyright owners. Absent a clear indication from Congress, the Court should not enlarge the statutory protections of the Copyright Act beyond that contemplated by either the language or purpose of the Act. *Sony Corp. of Amer., supra*, 464 U.S. at 431 ("The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme.")

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted this 6th day of August 1997,

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